SUBJECT INDEX

	Page
Jurisdiction	2
The question presented	2
Statement	3
Argument	4
1. The determination that the state court has no jurisdiction of the case is not subject to review	5
2. No "immunity" under federal law is involved in any event	8
Conclusion	8

TABLE OF AUTHORITIES CITED

Cases	Page
Baltimore & Ohio R. Co. v. Kepner, 314 U. S. 44	6
Black v. Cutter Laboratories, 351 U. S. 292	5
Iowa Central Railway Company v. Iowa, 160 U. S. 389	8
Miles v. Illinois Central R. Co., 315 U. S. 698	6
Smith v. Adsit, 83 U. S. 185	6
Southern R. Co. v. Mayfield, 340 U. S. 1	7

Statutes

United States Code, Title 15, Sec. 1464(d)(2)	2
United States Code, Title 28, Sec. 1257(3)	2, 5, 8
United States Code Annotated, Title 12, Secs. 1461-1468	2

IN THE

Supreme Court of the United States

October Term, 1963

No. 862

BERNARD REICH and SYLVIA REICH, depositors and members of BEVERLY HILLS FEDERAL SAVINGS AND LOAN ASSOCIATION, individually and in behalf of BEVERLY HILLS FEDERAL SAVINGS AND LOAN ASSOCIATION and the other depositor-members of said association, similarly situated,

Petitioners,

vs.

EUGENE WEBB, JR., MARGUERITE R. WEBB and BEVERLY HILLS FEDERAL SAVINGS AND LOAN ASSOCIATION,

Respondents.

On Petition for a Writ of Certiorari to the District Court of Appeal of the State of California, Second Appellate District.

Brief of Respondent, Beverly Hills Federal Savings and Loan Association, in Opposition.

Respondent Beverly Hills Federal Savings and Loan Association opposes the granting of a writ of certiorari. The Petition does not show any basis for the invocation of this Honorable Court's certiorari jurisdic-

tion. The decision of the court below is simply an application by the highest court of the State of California of its own doctrine of exhaustion of administrative remedies limiting the exercise of jurisdiction by California courts, and does not present any question reviewable by this Court.

Jurisdiction.

Jurisdiction of this matter is claimed under 28 U. S. C. § 1257(3) on the ground that the decision below creates an immunity for the benefit of Respondents under the provisions of the Home Owners' Loan Act of 1933.[1] Jurisdiction on this basis is denied by Respondents. As hereinafter pointed out, no "title, right, privilege or immunity is specially set up or claimed" or has been set up or claimed in this case under said Act.

The Question Presented.

The statement of the questions presented in the Petition assumes that certiorari jurisdiction is established and that this Honorable Court should determine whether claims of breach of fiduciary duty are the subject of "an appropriate administrative remedy" pursuant to the provisions of 15 U. S. C. § 1464(d)(2).

To the contrary, the real question presented by this Petition is whether the opinion of the court below is a final judgment of the highest court of a state in a matter "where any title, right, privilege or immunity is specially set up or claimed under the constitution, treaties or statutes . . . . the United States."

---

[1] 12 U. S. C. A. §§ 1461-1468

Statement.

As pointed out in the statement of Petitioners (Pet. 7-11), this is simply an action to enforce alleged common law fiduciary obligations of directors and former directors of Respondent Beverly Hills Federal Savings and Loan Association, a claim in no way depending on federal law. It is in form a derivative suit in view of the refusal of the existing management to act. The highest court of the State of California has held that such derivative suit asserting such common law rights of the Association is subject to the jurisdictional requirement that before action may be brought such claims be first submitted to the Federal Home Loan Bank Board. In so holding, the court has applied a general requirement of exhaustion of administrative remedies which is a jurisdictional prerequisite to resort to the California courts in all cases between all litigants. As pointed out in the Petition, the court discussed the administrative procedures provided by the Home Owners' Loan Act of 1933. Its discussion of these procedures, however, is simply a statement of a fact upon which the application of the California doctrine of exhaustion of administrative remedies depends.

ARGUMENT.

Fundamental to any consideration of this Court's certiorari jurisdiction is a proper understanding of the decision of the District Court of Appeal of the State of California. The basis of said court's decision that the California courts have no jurisdiction over the assertion of common law claims of fiduciary duty by derivative action in this case is stated in that portion of its opinion commencing at page 12 of Appendix B to the Petition. It is there pointed out, citing California authority announcing a rule of California procedure, that it is a jurisdictional prerequisite to resort to the courts in any case wherein administrative procedures are provided that such remedy be first exhausted. In this connection it is made clear that it is of no significance whether the statute providing the remedy makes exhaustion of such remedy a condition precedent to resort to the courts and further, that if the question of the availability of administrative remedy is involved and an administrative agency exists "it lies within the power of the administrative agency to determine in the first instance, and before judicial relief may be obtained, whether a given controversy falls within the statutory grant of jurisdiction." It is thus apparent that all that has been held by the District Court of Appeal is that the Home Owners' Loan Act of 1933 establishes an administrative procedure and an administrative agency to which Petitioner was at least required to submit its controversy so that such agency could determine whether it would exercise administrative jurisdiction over it. It is also abundantly clear that the court did not deny jurisdiction of the California courts on the ground that it was under compulsion of the Home Owners' Loan

Act of 1933 or any other federal law to do so. Under such circumstances the decision is merely a determination by the State courts of a matter of local procedure which is not subject to review by this Honorable Court.

The provision of 28 U. S. C. § 1257(3) conferring certiorari jurisdiction where a title, right, privilege or immunity is set up under a federal statute, is not intended to establish such jurisdiction over every case in which there is a discussion of the construction of a federal statute. As this Court has often made abundantly clear, certiorari jurisdiction is for the purpose of reviewing judgments, not statements in opinions. *Black v. Cutter Laboratories*, 351 U. S. 292. The reference to the Home Owners' Loan Act of 1933, in the opinion of the District Court of Appeal of the State of California, is at most the assignment of a reason why in its view the California rule requiring exhaustion of administrative remedies is applicable. More accurately it is simply the statement of its view as to what the facts are upon which such local rule applies. It is manifest in any event that it does not constitute a determination that any immunity or privilege exists under such statute.

1. The Determination That the State Court Has No Jurisdiction of the Case Is Not Subject to Review.

Whatever the reasons for its decision, it is clear that a decision of the highest State court denying jurisdiction is, unless such denial is on a discriminatory basis violating constitutional principles, solely the concern of such State court, and does not raise any federal question.

It was originally so held in *Smith v. Adsit*, 83 U. S. 185. Relief against a sale of land on the ground that it violated an act of Congress was denied in a State court for lack of jurisdiction. The writ of certiorari was dismissed by the Supreme Court, in an opinion which flatly states that regardless of the reasons assigned the State court's holding which denies jurisdiction is not reviewable on certiorari. The court said:

> ". . . But whatever may have been the reasons for the decision, whether the court had jurisdiction of the case or not, is a question exclusively for the judgment of the State court." (p. 190.)

There are only two exceptions which have ever been recognized to this rule. The first is that in denying jurisdiction the State courts may not discriminate between claimants, at least where such claimants are asserting rights under federal statutes. Examples of decisions of this Honorable Court imposing the latter limitation are *Baltimore & Ohio R. Co. v. Kepner*, 314 U. S. 44, and *Miles v. Illinois Central R. Co.*, 315 U. S. 698. There is, however, in the case at bar no claim that there has been any discrimination by the courts of California in the denial of jurisdiction nor, in fact, is there any claim that the Petitioner herein is asserting any rights under a federal statute. Rather, it is denied by Petitioner that the federal statute has any application.

The only other exception to the rule above stated is that where a State court has denied its jurisdiction because it has felt under compulsion of federal law to do so, certiorari may be granted to relieve the court of such compulsion. This question was fully and authoritatively discussed by this Honorable Court in *Southern*

R. Co. v. Mayfield, 340 U. S. 1. In that case, the opinion of the State court did not make it clear whether it was denying jurisdiction of its courts to dismiss under the doctrine of *forum non conveniens* in a case under the Federal Employers' Liability Act upon the basis of "its own notions of procedural policy" or "because it felt under compulsion of federal law as enunciated by this court so to hold." For that reason the case was remanded to the State Supreme Court to act consistently with the view of the Court on the latter assumption. It is made abundantly clear, however, that if the basis for the court's decision was simply its own notions of procedural policy, no certiorari jurisdiction could be invoked. In this respect this Court said:

> ". . . If denial of a motion to dismiss an action under the Federal Employers' Liability Act is rested on such a general local practice, no federal issue comes into play. . . . ." (p. 3.)

As above pointed out, the decision of the District Court of Appeal of California makes it clear beyond question that it is simply the general local practice which is therein applied and that the court has not acted "under compulsion of federal law." This is removed from any legitimate dispute by the court's clear statement that it is the *availability* of an administrative agency to which the question of proceeding administratively can be submitted that sets in motion the requirement applied and that such requirement applies regardless of the fact that the statute creating the administrative body and the administrative procedure does not purport to make "the exhaustion of the remedy a condition of the right to resort to the courts." (Pet. App. B, p. 12.)

2. No "Immunity" Under Federal Law Is Involved in Any Event.

Wholly apart from the sufficient reason stated under heading 1 hereof, precluding exercise of certiorari jurisdiction, it is apparent that there is no foundation to the claim that the application of the doctrine of exhaustion of administrative remedies operates to create an immunity within the meaning of 28 U. S. C. § 1257(3). The operation of the doctrine of exhaustion of administrative remedies does not provide any immunity to any party with respect to the assertion of any claims against them. It simply imposes a procedural requirement against proceeding in a particular fashion. No substantive rights of the Petitioners can in any respect be effected by their being first required to at least submit the matter to the Federal Home Loan Bank Board so that it can determine the extent to which it will exercise its administrative jurisdiction. It is thus clear that the entire question presented relates solely to a matter of local procedure and not to a matter of immunity as a matter of substantive right. Determinations of matters pertaining to local procedure are not a proper subject of certiorari jurisdiction unless they involve constitutional guarantees. *Iowa Central Railway Company v. Iowa*, 160 U. S. 389.

Conclusion.

There is no basis for invocation of this Honorable Court's certiorari jurisdiction and therefore the Petition should be denied.

Respectfully submitted.

THOMAS W. CLARKE,
Attorney for Respondent, Beverly Hills Federal Savings and Loan Association.